No. 78-1535

In the Supreme Court of the United States

OCTOBER TERM, 1978

ODELL BROWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-15 to A-28) is reported at 594 F.2d 345. The opinion of the district court (Pet. App. A-1 to A-14) is reported at 459 F. Supp. 321.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1979. The petition for a writ of certiorari was filed on April 9, 1979 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly dismissed an indictment on the ground that two government agents gave false testimony at a pretrial suppression hearing.

STATEMENT

In an indictment filed in the United States District Court for the Western District of New York, petitioner was charged with conspiracy and aiding and abetting the distribution of heroin, in violation of 21 U.S.C. 846 and 841(a)(1). After a pretrial hearing, the district court found that two agents of the Drug Enforcement Administration had given false testimony at the hearing, and it ordered the suppression of certain evidence and the dismissal of the indictment against petitioner and his co-defendant (Pet. App. A-1 to A-14). On the government's appeal, the court of appeals reversed the suppression order and remanded the case for reinstatement of the indictment (Pet. App. A-15 to A-28).[1]

1. The relevant facts are set forth in detail in the court of appeals' opinion. Briefly, on February 16, 1976, the government sought arrest warrants for petitioner, co-defendant Forbes, and one "Margaret Carcer" (Pet. App. A-21). The complaint and accompanying affidavit contained information from a "reliable informant" concerning the narcotics-related activities of petitioner, Forbes, and "Carcer" (Pet.

[1] The court of appeals ordered reinstatement of the indictment against both petitioner and his co-defendant, Gary L. Forbes.

App. A-18 to A-21). In fact, however, the name "Margaret Carcer" was a deliberate misspelling of the name of the government's informant, Margaret Carriger (Pet. App. A-16 to A-18). The concealment of Carriger's role as an informant was intended to protect Carriger, who had been threatened by petitioner (Pet. App. A-17 to A-18). On the basis of the complaint and affidavits, a federal magistrate signed all three arrest warrants, although the warrant for the arrest of "Carcer" was apparently withheld from the marshal. Forbes was arrested on the street in front of his house, and he asked to return briefly to his apartment. The DEA agents who accompanied him observed marijuana and hashish lying in plain view in his apartment (Pet. App. A-21 to A-22). A search warrant for his apartment was then obtained, and additional quantities of narcotics and paraphernalia were seized (Pet. App. A-22).

2. At a pretrial suppression hearing, the arresting DEA agent and a Buffalo police detective who assisted him both testified that when they presented the complaints and warrants to the magistrate they had informed him about their concern for Carriger's safety and had explained that her identity was being masked in order to make it appear that she was not the informant (Pet. App. A-21, A-27). Although the magistrate who issued the warrants had no independent recollection of whether he had been so informed, he stated, in response to a hypothetical question, that he would not have signed the warrants if he had known that they included false information

(*ibid.*). The district judge, who credited the testimony of the magistrate and disbelieved the two investigating officers, held that the arrest warrant was invalid because of the false statements in the affidavits. He ordered the evidence seized in Forbes' apartment to be suppressed because the "legality of the search warrant and the admissibility of the seized items [were] 'bootstrapped' to the legality of the arrest warrant" (Pet. App. A-7). Because the arrest warrants were improperly obtained, the court held, the subsequent search warrant was unlawfully derived as well. The district court also found that the agent and the police officer had perjured themselves when they testified that they had informed the magistrate of the misstatements in the complaint. As a remedy for this misconduct, the court dismissed the indictment (Pet. App. A-12 to A-14).

3. The court of appeals reversed (Pet. App. A-15 to A-28). It held, first, that the inclusion of the erroneous statements in the affidavit for Forbes' arrest warrant did not require suppression of the evidence seized at Forbes' apartment at the time of his arrest (Pet. App. A-22 to A-24). The court concluded that Forbes' arrest in a public place was lawful because there was " 'super abundant' " probable cause, and accordingly the evidence found in plain view at the time of the arrest was lawfully seized (Pet. App. A-22 to A-24).[2] Second, the court held (Pet. App. A-25 to A-27) that the district court had

[2] Petitioner does not here challenge that portion of the decision below.

abused its discretion in dismissing the indictment because the defendants had suffered no prejudice from the agents' alleged perjury,[3] and there had been no showing that the agents' conduct was sufficiently "widespread or extraordinarily serious" to require the drastic remedy of dismissal (Pet. App. A-26 to A-27).

ARGUMENT

1. Petitioner's effort to obtain review of the decision reinstating the indictment should be rejected as premature. If the district court had denied petitioner's motion to dismiss the indictment, its ruling would not have been subject to interlocutory appeal. *United States* v. *MacDonald*, 435 U.S. 850 (1978); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); cf. *Abney* v. *United States*, 431 U.S. 651 (1977). Since the court of appeals' reinstatement of the indictment puts petitioner in the same position as would the district court's denial of his motion, there is no need to delay the trial by reviewing the case before final judgment. Petitioner may be acquitted at trial, in which case his claim will be moot.

[3] Judge Lumbard, concurring in the reversal of the district court's order, dissented from the majority's acceptance of the lower court finding that the agents had lied under oath (Pet. App. A-27 to A-28). Finding that the magistrate's testimony had not been "definite and clear," Judge Lumbard stated that he would hold the district court's factual determination to be "clearly erroneous." Although we argued in the district court that the agent and the local officer assisting him were testifying truthfully, we did not attack the district court's findings on appeal.

If, on the other hand, he is convicted and his conviction is affirmed, he will be able to present the claim raised in this petition, as well as any others that may arise during the trial, by seeking review in this Court of the final judgment.

2. In any event, the court of appeals was correct in reinstating the indictment. As the court recognized, there are some decisions suggesting that dismissal of an indictment may be ordered where a defendant has been prejudiced by serious governmental misconduct or where only the extreme remedy of dismissal will be sufficient to deter widespread unlawful conduct and to maintain the integrity of the legal process. See, *e.g.*, *United States* v. *Fields*, 592 F.2d 638, 648-649 (2d Cir. 1978), petitions for cert. pending, Nos. 78-1474, 78-1480, 78-1483; *United States* v. *McCord*, 509 F.2d 334, 349-350 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 390 (1975). But, as the court of appeals correctly held, the rationale of those decisions provides no justification for the dismissal here.

Both courts below recognized that petitioner was not prejudiced either by the misstatements in the affidavit for the arrest warrant or by the agents' alleged perjury at the pre-trial hearing. The district court made it clear that its order of dismissal here was not aimed at redressing any injury suffered by petitioner or his co-defendant, but rather at imposing the most extreme sanction possible on the government (see Pet. App. A-13 to A-14). Indeed, as the court of appeals pointed out, petitioner was certainly

not prejudiced, and the government's conduct may have given him an advantage at trial (Pet. App. A-26):

> [Petitioner] suffered no prejudice by the misconduct that was found to have occurred. There is no claim that the grand jury that indicted [petitioner] was misled in any way. As stated in Part II, there was ample probable cause for the arrest. No evidence was gathered that would not have been obtained absent the misconduct. If anything, the [petitioner] might even have been advantaged by the entire sequence of events. The misstatements in the affidavit weakened, rather than strengthened, the showing of probable cause to the Magistrate. Also [petitioner] now has substantial material with which to impeach important government witnesses if, in the face of such impeachment material, they testify at trial.

Where, as here, a defendant suffers no prejudice as a result of an isolated episode of government misconduct, he is not entitled to the dismissal of a properly framed indictment. See, *e.g.*, *United States* v. *Owen*, 580 F.2d 365, 367 (9th Cir. 1978); *United States* v. *Acosta*, 526 F.2d 670 (5th Cir.), cert. denied, 426 U.S. 920 (1976).

The court of appeals also correctly concluded (Pet. App. A-26) that the extreme remedy of dismissal was not justified by the necessity of deterring widespread misconduct or of maintaining judicial integrity, since the district court made "no finding of widespread or continuous official misconduct of the

dimensions necessary to warrant imposition of the sanction of dismissal." There is no support in the record for petitioner's bald assertion that the remedy of dismissal is required because no official sanctions are ever imposed upon agents of the federal government. Cf. *United States* v. *Caceres*, No. 76-1309 (Apr. 2, 1979), slip op. 14 & n.25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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